comparable rates from their intrastate access tariffs)." The Commission also asks "whether the LECs' access charges would be an appropriate framework for LEC-CMRS interconnection once our Access Reform proceeding is completed."[157]

We believe that interconnection should be based on Mutual Compensation, not the current access pricing mechanism, and that access should be revised so as to avoid uneconomic distinctions with interconnection. Using a subset of the current access charges for interconnection would not move in this direction and thus would not help get pricing to where it should be. A better approach is for us to begin in April negotiating Mutual Compensation arrangements for LEC-to-CMRS interconnection, while the Commission moves forward with access reform based on consistent principles. This approach is economically sound and is consistent with the new Act.

3) Existing Interconnection Arrangements Between Neighboring LECs

The Commission asks whether LECs should be required to offer CMRS providers comparable arrangements to those that the LECs offer neighboring LECs.[158] This would not be appropriate for the reasons we discuss below.

We have a number of different types of arrangements with independent telephone companies which have been created over the years. Some arrangements are with "pooling LECs" that share costs and revenues, and some are with nonpooling

[157] NPRM, para. 68.
[158] Id. at para. 69.

LECs. We are in the process of negotiating new arrangements and hope to move toward Mutual Compensation where we do not yet have it.

Arrangements with independent telephone companies began years ago in a much different technological, marketing, and regulatory environment. LECs traditionally have not had overlapping service territories and therefore have not competed in the offering of access and interconnection service to the same locations. LECs have interconnected in order to transmit calls between separate franchise areas. For instance, in order to terminate an interstate communication, an IXC may bring the communication to the central office of a LEC that does not serve the area where the call is designated for termination.[159] The LEC then traditionally has transported the communication to a "meet point" on the border of the service area of another LEC that takes the communication and transports it to that LEC's appropriate end office for termination in that LEC's franchise service area. In this arrangement, the access charge to the IXC for origination or termination of the communication is the total of the applicable federally tariffed rate elements for each LEC's part of the transmission. This interconnection allows the LECs to meet their universal service and "carrier of last resort" obligations to extend service to all customers. This interconnection has stimulated the use of each LEC's network and thus increased the contributions to each LEC's coverage of its shared and common costs of providing basic services.

[159] If instead the LEC did serve the terminating location, the LEC would route the communication from its own central office to its appropriate end office and charge the IXC for interoffice transport.

With the advent of LECs not in pooling, issues of contribution recovery have changed and new arrangements are being developed. Therefore, it would not be appropriate to use the existing arrangements as a model to establish arrangements for LEC-to-CMRS interconnection.

4) Existing Interconnection Arrangements Between LECs And Cellular Carriers

The Commission states:

> Another possibility would be to apply the same rates, terms, and conditions in existing LEC-cellular interconnection arrangements to broadband PCS providers, or to other categories of CMRS providers...[T]his option could help ensure that CMRS providers would receive interconnection on terms and conditions that are at least as favorable as cellular carriers.[160]

This is the one alternative suggested by the Commission that could be implemented on an interim basis without causing the economic problems we have discussed. It is not needed, however, at least in California and Nevada, since we

[160] NPRM, para. 69.

already offer the same terms and conditions to PCS and cellular providers.[161] In fact, this alternative might decrease the PCS providers' flexibility to negotiate contracts that meet individual needs.

In this regard, the Commission asked "whether cellular carriers, like neighboring LECs, are better established than broadband PCS providers and thus are more likely to have negotiated reasonable interconnection arrangements."[162] PCS providers are negotiating identically priced interconnection arrangements with Pacific Bell as cellular providers, and there is no need for special arrangements for PCS. The Commission has prescribed the types of interconnection that must be made available. To the LEC, it does not matter what type of wireless provider or technology is associated with two-way calls that are passing over the interconnection facilities. In California, Pacific Bell offers new PCS carriers the same contract options as existing carriers. Nevada Bell's interconnection offerings are tariffed.

[161] The Commission already required this for interstate interconnection in the Second Report and Order in 93-252. In that order, at paragraph 233, the Commission stated: "Second, we require that LECs shall establish reasonable charges for interstate interconnection provided to commercial mobile service licensees. These charges should not vary from charges established by LECs for interconnection provided to other mobile radio service providers. In a complaint proceeding, under Section 208 of the Act, if a complainant shows that a LEC is charging different rates for the same type of interconnection, then the LEC shall bear the burden of demonstrating that any variance in such charges does not constitute an unreasonable discrimination in violation of Section 202(a)of the Act."

[162] NPRM, para. 70.

5) <u>Intrastate Arrangements Between LECs And New Entrants</u>

The Commission requested comments "on the various intrastate interconnection arrangements between LECs and new entrants and whether CMRS providers should be eligible for these offerings." The Commission also requested comment "on the extent to which state actions in wireline-wireless interconnection may serve as a model for LEC-CMRS interconnection."[163]

The Mutual Compensation contract between MFS and Pacific Bell provides for 0.75 cents for the termination of local calls on one another's network. That rate was negotiated as part of a very comprehensive package of local interconnection arrangements. The CPUC approved our contract, but ordered that it be changed from an average 1.4 cents a minute for the termination of toll calls to an unbundled structure that matches Pacific Bell's intrastate switched access rates, but still averages approximately 1.4 cents per minute. Pacific Bell also received an order from the CPUC mandating contracts with CLCs that follow a set of certain preferred outcomes. These preferred outcomes include Bill and Keep for local calls for an interim period of only one year, during which time the CPUC will have hearings to consider permanent prices, and the imposition of intrastate switched access charges for toll calls. Pacific Bell strongly believes that this decision was a mistake and that Mutual Compensation should apply to both local and toll calls. The CPUC has scheduled hearings on this issue for later this year.

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[163] <u>Id.</u> at para. 72.

There are two basic principles that have governed the philosophy of Mutual Compensation. The first is that each network provider involved in processing a call from one provider's end user to another provider's end user should be compensated for its costs in processing the call. The second principle is that because, in most cases, the originating provider charges its end user for the call, while the provider who terminates the call receives no revenue from an end user, the terminating provider should receive compensation for its costs from the originating carrier. Using this foundation, it becomes problematic to assume that CMRS providers, who charge their end users for both originating and receiving calls, should necessarily and automatically receive compensation from a second carrier for that call. This CMRS provider has been amply compensated for its costs from its end users. The terminating carrier, on the other hand, if it is an incumbent LEC, has received no revenue and no compensation for its costs. This aberration must be considered as part of our process of moving LEC-to-CMRS agreements to Mutual Compensation. That is, we expect that our prices to our end users will need to be adjusted so that we are compensated for our costs.

The extent to which the CPUC actions governing the interconnection between LECs and CLCs should also apply to CMRS providers is partially dependent upon the degree to which the CMRS providers are viewed as competing LECs with the same obligations. In other words, the CPUC has set forth extensive guidelines that CLCs must follow in offering local exchange service to California consumers. These competing LECs are subject to many of the same consumer protection, privacy, equal access, and universal service obligations that govern incumbent LECs.[164]

As required by the new Act, under no circumstances should Bill and Keep apply to interconnection, unless parties choose to waive their right to mutual recovery. With its especially large imbalance of traffic, which is expected to be maintained for years, an interim Bill and Keep policy would be even worse with CMRS than it is with CLCs.

6) Fixed Percentage Of Measured Local Service

The Commission requested comments "on whether interconnection rates should be set at some fixed percentage of the measured local service rates that the LECs currently charge their local customers."[165] The Commission uses as an example a LEC charging the CMRS provider half of the LEC's own measured local service rate. The Commission's suggestion is in the right direction so long as this rate is used solely for local switching, which includes call set up and completion. Half of our measured local service rate would have a direct relationship to the cost of local switching for our termination of calls for CMRS providers on our network.

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[164] In WT Docket No. 96-6, the Commission has proposed authorizing broadband CMRS providers to offer fixed wireless local loop service, which we believe is comparable to local exchange service. Accordingly, in Docket 96-6 we recommend that services provided via fixed wireless local loops be regulated by the CPUC as CLCs.

[165] Id. at para. 73.

The overall rate for terminating a call on another provider's network, however, should not be fixed at some percentage of the rate of a local call that the LEC charges its own customers. Fixing the rate at some percentage of the rate for a local call has no relationship to the total cost associated with terminating that call. Because of the inherent benefits of interconnection to the incumbent LEC's tandem network, competing local carriers or CMRS providers, in large part, interconnect their networks at Pacific Bell's access tandem rather than directly to an end office. There are substantial costs associated with calls entering Pacific Bell's network at the tandem level that have nothing to do with the costs of a local call. Most local calls that are internal to Pacific Bell's network do not use the access tandem network at all. As we discuss above, we must be allowed the opportunity to recover our tandem switching and common transport costs as well as the costs of any of our dedicated facilities that the CMRS provider uses.

The cost of terminating a call to another provider's network should be based on LRIC, with contribution towards shared and common costs. Fixed formulas for this recovery should be avoided. Flexibility is needed to ensure that the rate is not set at such a level that perverse incentives are set up to misuse these call terminations. For example, if the rate for Mutual Compensation is set too high for local calls, there might be an incentive for a CLC or CMRS provider to encourage other customers or providers (e.g., some enhanced service providers) with disproportionately high numbers of terminating calls to interconnect with its network. In this way, the CLC or CMRS provider could arbitrage the Mutual Compensation rate structure by charging the other providers nothing and reaping the rewards of being able to terminate large numbers of calls for which compensation is received from the incumbent LEC. Therefore, it is important that LECs have the opportunity to recover their costs as they incur them, with greater recovery for toll calls than local, and greater still for calls that use the tandem network.

7) Uniform Per-Minute Interconnection

The Commission asked "[w]hether a presumptive uniform per-minute interconnection rate should be established for all LECs and CMRS providers." The Commission also asked "whether carriers should apply different interconnection rate levels in different geographic areas that they serve."[166]

The Commission should not adopt a presumptive uniform rate for all LECs and CMRS providers. Under the Communications Act of 1934, rates must be reasonable. In order to be reasonable, rates must bear some reasonable relationship to cost. Although presumptive rates are not required to be tied directly to the carrier's own costs, they must reflect a reasonable relationship to relevant costs.[167] There is no reason to believe that the costs of all LECs and CMRS providers are uniform. Placing a burden on a carrier to show that its costs are different than a uniform rate that might be developed would be an unreasonable burden.[168] For some carriers, the uniform rate

[166] Id. at para. 74.

[167] E.g., in price cap regulation, the Commission allowed rate changes based on industry-wide costs reflected in a productivity factor.

[168] For these reasons, the Commission should definitely not prescribe a uniform rate.

might result in a confiscation of their property, for others a windfall. Moreover, unless the uniform rate were set so low that no providers' costs could be below it, the uniform rate would create a price umbrella for CLCs and other new entrants to price below in providing their own competitive interconnection services. But if priced too low, the uniform interconnection rates would discourage entry into the business. Thus, this type of uniform price setting is likely to be anticompetitive.

As discussed above, we strongly believe that carriers should be allowed to offer interconnection services at different rates in different geographic areas, as the Commission currently allows with zone pricing of special access and switched transport. Again, however, there should be no uniform geographic rates. Negotiation and market forces, with state commission review where needed, should be allowed to work.

8) <u>Bill And Keep Pending Negotiations</u>

The Commission requested comments on the following: "Whether a bill and keep arrangement should be imposed on a LEC pending the negotiation of a satisfactory interconnection arrangement between the LEC and a CMRS provider or the approval of other cost based charges. Would CMRS providers have an incentive to negotiate under this approach?"[169]

With Bill and Keep, a CMRS provider would be receiving terminating service at a price of zero and would have no incentive to negotiate something reasonable. By

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[169] <u>NPRM</u>, para. 75.

starting from the existing interconnection agreements and offerings, both sides will have an incentive to move to a fair and equitable Mutual Compensation plan.

LONG TERM PRICING PROPOSALS

The Commission requested comments "on what the long term approach to interconnection pricing should be."[170] We provided our comments on this issue above in Part I - E. The Commission and state regulators should reform their access and interconnection rules so that all providers in the same geographic area that serve similar types of customers are treated consistently. This will avoid, among other problems, uneconomic "traffic deflection from a more costly form of interconnection to a less costly form," which concerns both the Commission and us.[171] If the difference in price for different alternatives is based on the underlying costs, then deflection of traffic is good since it represents the use of the most efficient alternative. If, however, the difference in price is based on artificial regulatory distinctions between "interconnection" and "access," the deflection represents uneconomic arbitrage and promotes uneconomic use of resources.

The Commission recently acknowledged its concerns that the existing access charge structure can encourage this uneconomic behavior:

> [W]e acknowledge that the existing access charge rate structure was developed in a monopoly environment. Economic, technological, and legal conditions have changed

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170 Id. at para. 76.
171 Id. at para. 77.

> since the existing rate structure was developed, and we are committed to reexamining our rules in the near future.
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> * * *
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> Although we cannot predict the exact manner in which competitive markets will develop, we believe that the disparities between costs and prices created by our access charge rules create substantial incentives for uneconomic bypass in markets exposed to competitive entry.
>
> * * *
>
> In an environment where competition has begun to emerge, those incentives could encourage inefficient entry in markets for services where access charges artificially inflate prices and could prevent end users from receiving the full benefits of competition.[172]

We are encouraged by the Commission's statements. We urge it to move ahead with access reform, without first "throwing caution to the wind" and creating even worse distortions via an "interim" Bill and Keep scheme.

SYMMETRICAL PRICING PROPOSALS

The Commission requested comments "on the tentative conclusion that interconnection arrangements should include symmetrical compensation rates, at least during an interim period." With symmetrical rates, LECs and CMRS providers would charge each other the same rates for termination.[173]

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[172] Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, FCC 96-58, Order, released February 15, 1996, paras. 61, 63, and 73.

[173] NPRM, para. 80.

This is an issue that should be left in the first instance up to negotiation by the parties. Symmetrical pricing is not applicable to our existing agreements because most CMRS providers have chosen arrangements where our end users do not compensate us for the costs of originating calls to CMRS end users, and we recover those costs from the CMRS providers. Thus, the CMRS providers do not charge us. In the case of traffic that is identified to us as interstate, we recover all our costs from charges paid by IXCs, and accordingly we do not charge or pay the CMRS providers. As we explained above in Part II - A-1, this is not a violation of the Commission's requirements, contrary to the statements of some CMRS providers.[174] As we negotiate Mutual Compensation, we will need to be flexible. Symmetrical pricing may or may not allow each party to recover its costs, depending on how similar the costs of each party are to each other. Under the new Act, the parties are allowed to negotiate for mutual recovery of costs, and we of course intend to do that.

3 (B). FORCING LECs TO OFFER FREE INTERCONNECTION IS CONFISCATORY UNDER THE COMMUNICATIONS ACT AND VIOLATES THE FIFTH AMENDMENT'S PROHIBITION ON TAKINGS OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION

The Commission states:

> We also tentatively conclude that a requirement that LECs and CMRS providers not charge one another for terminating traffic from the other network would not violate any party's legal rights. Specifically, we believe that a bill and keep requirement would not deprive either LECs or CMRS providers of a reasonable opportunity to recover costs they

[174] See id. at para. 81.

> incurred to terminate traffic from the other's network, because these costs could be recovered from their own subscribers.[175]

As we have discussed, the Commission does not explain how it believes that we can recover the costs from our subscribers. In our General Comments in Part I - D, we explained why we cannot make any changes in end user rates in time for an interim change to Bill and Keep, and why we cannot and should not recover all the relevant costs from our end user subscribers who call CMRS end users. Unless the Commission intends to seek an immediate increase in SLCs, its statement that we can recover the costs from our own subscribers is meaningless. We conclude that a scheme which requires LECs to allow interconnection to their networks and to terminate calls for free constitutes confiscation and an unconstitutional taking of our property. Depending on the details of the requirements, we estimate that this scheme would cost us from $50 million to $75 million.

The Proposed Bill And Keep Mechanism Is Confiscatory Under The Communications Act Of 1934 And The Telecommunications Act Of 1996

A rule which allows LECs no compensation for their CMRS interconnection and termination costs would deprive LECs of their statutory right to just and reasonable rates. The Commission's action would be confiscatory, and violates the Commission's own prior rulings.

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[175] Id. at para. 62.

As the Commission has stated, there are "requirements for protection of investors against confiscation that inhere in the statutory standard of just and reasonable rates" set forth in 47 U.S.C. Section 201.[176] Where utility rates violate "investor interest against confiscation," they are not just and reasonable.[177] As Justice Harlan has said, a court reviewing a rate order must assure itself that "the order may reasonably be expected to maintain financial integrity, attract necessary capital, <u>and fairly compensate investors for the risks they have assumed</u>."[178] Because the Commission's proposed Bill and Keep mechanism sets LECs' compensation for CMRS interconnection and termination at zero, without establishing any other cost recovery mechanism, the proposal falls below this threshold and would unlawfully confiscate our property.[179]

The Telecommunications Act of 1996 supports the conclusion that Bill and Keep for CMRS-to-LEC interconnection would confiscate our property. The new Act requires reciprocal compensation[180] and requires that any reciprocal compensation arrangement voluntarily negotiated by a LEC must "provide for the mutual and reciprocal recovery by

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[176] <u>In the Matter of Policy and Rules Concerning Rates for Dominant Carriers</u>, CC Docket No. 87-313, <u>Further Notice of Proposed Rulemaking</u>, 3 FCC Rcd 3195, para. 319 (1988), citing <u>Jersey Cent. Power & Light v. FERC</u>, 810 F.2d 1168, 1177 (D.C. Cir. 1987) (The "zone of reasonableness within which rates may properly fall...is bounded at one end by the investor interest against confiscation...."), (quoting <u>Washington Gas Light Co. v. Baker</u>, 188 F.2d 11 (D.C. Cir. 1950), <u>cert</u>. <u>denied</u>, 340 U.S. 952 (1951).

[177] <u>Jersey Cent. Power & Light</u>, 810 F.2d at 1177.

[178] <u>Permian Basin Area Rate Cases</u>, 390 U.S. 747, 792 (1968) (emphasis added).

[179] Since we are no longer under rate of return regulation with a guaranteed rate of return, the Commission may not rely on that to assure itself that an order here would not violate these principles.

[180] Section 251(b)(5).

each carrier of costs associated with the transport and termination" of calls.[181] The new Act does not preclude negotiated arrangements that "afford the mutual recovery of costs through the offsetting of reciprocal obligations...."[182] Bill and Keep for LEC-to-CMRS interconnection certainly does not provide mutual recovery by offsetting reciprocal obligations. Because the traffic flow from CMRS to LECs is over four times the traffic flow the other way, the LECs' terminating obligation is over four times the CMRS providers' obligation. Thus, the obligations do not come anywhere close to offsetting each other, and wiping out the obligations would not provide mutual recovery of costs, as required by the statute. In addition, Bill and Keep is allowed only where the parties waive their right to mutual recovery,[183] and it relates only to charges for transport and termination of traffic, not to interconnection.[184] The LECs also are entitled to compensation for the costs of interconnection, and a "reasonable profit."[185] Therefore, the new Act makes it even more clear that Bill and Keep for CMRS-to-LEC interconnection would be confiscatory.

Our Right To Compensation For Use Of Our Network Is A Property Right Cognizable Under Takings Jurisprudence

Our intangible right to compensation for others' interconnection to our network for the termination of calls is a right cognizable under the Supreme Court's Fifth

[181] Section 252(d)(2)(A).
[182] Section 252(d)(2)(B).
[183] Section 252(d)(2)(B)(i).
[184] See Section 252(d).
[185] Section 252(d)(1).

Amendment takings jurisprudence. The Court has held that the definition of property may extend beyond real property[186] to intangible rights such as intellectual property interests, and personal property rights such as the right to certain funds. Indeed, protected property interests include "every sort of interest the citizen may possess."[187]

The Commission concedes that we incur costs in allowing interconnection to the network, at least for peak-period usage.[188] Actually, we incur costs during all periods of usage, and the costs are far greater than Dr. Brock acknowledges.[189] By adopting a Bill and Keep mechanism, the Commission would deprive us of any compensation for these costs. This would confiscate our property by denying us the ability to earn revenues to cover our costs, and in so doing would constitute an unconstitutional taking.[190]

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[186] See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001-03 (1984) (pesticide manufacturer's trade-secret rights in certain health and safety data submitted to the EPA were property rights for purposes of the takings clause); Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (money deposited in an interpleader fund with a county court was property for takings clause purposes). See also City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 66-67 (1982) (definition of property for takings clause purposes extends to intangibles and personal property).

[187] United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

[188] NPRM, para. 33.

[189] See Hausman Statement, paras. 27-34, attached hereto as Exhibit B.

[190] To the extent the Commission's Bill and Keep proposal requires us to devote our real property and fixtures -- our telephone network -- to the use of others without just compensation, the proposal also authorizes a physical invasion of our property. Physical invasions are deemed unconstitutional without a need for further analysis. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

The Commission's Proposed Bill And Keep Arrangement Meets The Test For A Taking

The Commission's proposed Bill and Keep arrangement violates the prohibition on regulatory takings.[191] There are several tests for determining whether such a taking has occurred. The most apt here was set forth by the Supreme Court in Penn Central Transportation Co. v. New York City.[192] This test examines 1) the character of the governmental action, 2) the extent of the interference with reasonable, investment-backed expectations, and 3) the economic impact of the governmental action. The Commission's Bill and Keep proposal fails this test.

Under the first prong of the Penn Central test, the governmental action need not rise to the level of a physical intrusion onto property in order to violate the Fifth Amendment. While such intrusion in itself is sufficient to find a taking,[193] governmental action which deprives a party of intangible rights is also actionable.[194] Here, the Commission proposes to require LECs to allow others free interconnection and

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[191] See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("if regulation goes too far it will be recognized as a taking.").

[192] Penn Central, 438 U.S. at 124 (1978). See also Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985).

[193] Loretto v. TelePrompTer Manhattan CATV Corp., 458 U.S. 419, 426, 434-35 (1982) (any "permanent physical occupation" of property is an intrusion of such an "unusually serious character" that it constitutes a taking without regard to the public benefit the rule services or the insignificance of the property owner's economic loss.).

[194] See, e.g., Hodel v. Irving, 481 U.S. 704, 716 (1987) (statute which "virtually [abrogated] the right to pass on a certain type of property...to one's heirs" violated takings clause); Kaiser Aetna v. U.S., 444 U.S. 165, 176 (1979) (government deprived the claimant of the right to exclude others from its property, thereby depriving the claimant of an "essential stick[] in the bundle of rights that are commonly characterized as property.").

termination, thereby depriving them of their right to just and reasonable compensation set forth in the Communications Act.[195] This requirement violates the takings clause.

Under the second prong of the test, the Court will find a taking if the regulation frustrates the reasonable "investment-backed expectations" of the party challenging the governmental action.[196] A regulation may interfere with these expectations if it breaks a promise the government has made previously.[197] As noted, the Communications Act expressly guarantees common carriers just and reasonable rates and the Telecommunications Act of 1996 sets forth compensation requirements for interconnection and termination.

However, the claimant's reasonable investment-backed expectations need not arise from explicit governmental assurances. If the challenged regulation does not permit the claimants to make some reasonable use of their tangible resources, then it violates the takings clause.[198] Because the Bill and Keep mechanism which the Commission proposes completely deprives LECs of all compensation from CMRS providers for interconnection and termination, the proposed rule interferes with the LECs' reasonable, investment-backed expectation of compensation for use of their networks.

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[195] 47 U.S.C. § 201. See discussion of confiscatory rates above.

[196] See, e.g., Kaiser Aetna, 444 U.S. at 175; Ruckelshaus, 467 U.S. at 1005; Hodel, 481 U.S. at 714.

[197] Ruckelshaus, 467 U.S. at 1013 n. 17 ("the relevant consideration...is the nature of the expectations of the submitter at the time the data were submitted.").

[198] See Penn Central, 438 U.S. at 138.

Under the final prong of the Penn Central test, the Court examines the diminution in the value of the property at issue due to the challenged conduct.[199] Here, the Commission proposes to value at zero services which actually cause us substantial cost. Thus, at least as to those services that CMRS providers will use, their value is diminished to nothing by the Commission's action.

Therefore, all three prongs of the Penn Central test would be met by a Bill and Keep scheme. Accordingly, the scheme would take our property without just compensation.[200] In connection with regulatory takings, courts have a choice of remedies.[201] They may "invalidat[e the] excessive regulation" or they may "allo[w] the regulation to stand and orde[r] the government to afford compensation for the permanent taking."[202]

[199] See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

[200] Moreover, to the extent the Commission's bill and keep mechanism fails substantially to advance legitimate state interests and denies LECs an economically viable use of their network, the mechanism may constitute a substantive due process violation. See, e.g., Nollan v. California Coastal Comm'n., 483 U.S. 825 (1987) (articulating takings test substantially identical to earlier substantive due process standard); N. Karlin, Back to the Future: From Nollan to Lochner, 17 Sw. U.L. Rev. 627, 630-32 (1988) (opining that the burden Nollan places on government "is, in effect, the same test imposed on the state during the substantive due process days"); Dolan v. Tigard, 114 S. Ct. 2309, 2326-27 (1994) (Stevens, J. dissenting) (likening majority's regulatory takings holding to substantive due process holdings of 1920s).

[201] Lucas v. South Carolina Coastal Council, 112 S.Ct 2886, 2901 n.17 (1992).

[202] Id. at 2922 n.6 (Stevens, J., dissenting), (quoting First English Evangelical Church v. County of Los Angeles, 482 U.S. 304, 335 (1987)).

B. IMPLEMENTATION OF COMPENSATION ARRANGEMENTS MUST ALLOW NEGOTIATION UNDER THE AUSPICES OF THE STATES

1. NEGOTIATIONS AND TARIFFING SHOULD BE USED TOGETHER

The Commission asks whether parties prefer that LEC-CMRS interconnection rates be set by negotiated contract, by tariff, or by some combination of the two, and whether information regarding the terms of interconnection arrangements should be available publicly.[203] We prefer a hybrid approach that allows both tariffing and individually negotiated contracts, with public disclosure of pertinent (but not competitively sensitive) contract terms.

This approach gives the parties maximum flexibility and relieves regulators of unnecessary involvement in the ministerial details of contracting. Most importantly, this approach is consistent with the provisions of the Telecommunications Act of 1996. There, Congress expressly blesses the negotiated interconnection agreement approach, and provides for state commission intervention only to assist the parties and approve the final agreement, and for FCC intervention only where the state fails to act. Thus, the Commission is now legally obligated to allow the parties to negotiate interconnection arrangements.

[203] NPRM, paras. 90-92.

The Commission Must Allow Parties To Negotiate Interconnection Arrangements

As we have previously pointed out,[204] the Commission should allow customer-specific rates in addition to, and in some cases instead of, the averaged pricing embodied in tariffs. Allowing customer-specific rates is essential to allowing, or replicating, competitive conditions:

> Pricing to specific customer groups should reflect the true competitive value of what is being provided. When this is achieved, no money is left on the table unnecessarily on the one hand, while no opportunities are opened for competitors through inadvertent overpricing on the other.[205]

As Professor Hausman states in his accompanying Statement: "The best economic policy for interconnection is to allow parties to negotiate to see if they can arrive at a mutually agreeable interconnection arrangement. Such an agreement is likely to encourage an economically efficient and technically flexible solution which will benefit both companies' customers."[206] Professor Hausman goes on to state: "Parties know their own needs better than the regulatory process can discover, and individual parties are more flexible than regulation. Thus, they can come to an agreement which makes both parties better off than the outcome of the regulatory process."[207]

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[204] See In the Matter of Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Comments of Pacific Bell and Nevada Bell, filed December 11, 1995.

[205] R. Schmalensee and R.D. Willig, Handbook of Industrial Organization, v. 1, p. 598 (1989) (Prof. Hal Varian, quoting the Boston Consulting Group's advice to competitive firms).

[206] Hausman Statement, paras. 10, 46, Exhibit B hereto.

[207] Id. at para. 47.

In the new Act, Congress adopted an approach that endorses the parties' ability in the first instance to negotiate interconnection arrangements, and provides for state commission intervention only where necessary to resolve disputes. Thus, the Commission is now legally obligated to allow parties to negotiate interconnection arrangements, if they so desire. The new Act provides: "Upon receiving a request for interconnection . . . , an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b)[208] and (c)[209] of section 251."[210]

The Act makes clear that the parties have recourse to state commissions to assist their negotiations and approve their final agreements. The Act provides: "Any party negotiating an [interconnection] agreement . . . may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation."[211] Moreover, either party may petition the state commission to arbitrate "any open issues."[212] The parties must submit the final agreement to the state commission for approval, and the FCC may only get involved if the state fails to act upon the contract.[213] Finally, "a Bell operating company

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[208] Section 251(b) imposes obligations on all LECs with regard to resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation.

[209] Section 251(c) imposes additional duties on incumbent LECs with regard to interconnection: a duty to negotiate, to provide interconnection, to provide unbundled access, to allow resale, to give notice of network changes, and to allow collocation.

[210] Section 252(a)(1).

[211] Section 252(a)(2) (emphasis added).

[212] Section 252(b).

[213] Section 252(e).

may prepare and file with a State commission [for approval] a statement of the terms and conditions [of interconnection]."[214]

Thus, from start to finish, interconnection arrangements as envisioned in the new Act are to be hybrid processes, consisting in large part of individualized negotiation, with state commission intervention for limited, but important, purposes. This approach is consistent with our experience in California.

Contract Pricing As Overseen By The California Public Utilities Commission ("CPUC") Has Produced Beneficial Results

The process adopted by Congress -- a system of private negotiation with regulatory backup if necessary -- has previously been adopted by Australia and the United Kingdom, as well as a number of states including California.[215] In California, we engage in contract pricing, but submit the contracts to the CPUC in accordance with the CPUC's long-standing requirements.[216] This process fulfills this Commission's desire for public disclosure of contract terms (with adequate protection of LECs' and CMRS providers' proprietary data),[217] while affording the parties the flexibility of contract pricing.

The CPUC's policy of contract-based pricing works, and is consistent with Congress' mandate in the new Act. That contract process, which produced the current

[214] Section 252(f).
[215] Hausman Statement, para. 50.
[216] CPUC Decision 50837.
[217] NPRM, para. 91.

agreements between Pacific Bell and CMRS providers, serves the industry well and should be allowed to continue.

Tariffing Or A Similar Process Is Appropriate For Terms Of Common Application

Where interconnection terms have common application to all two-way CMRS providers or to all one-way CMRS providers that a LEC serves, we have no objection to those terms appearing in a publicly-filed tariff. Indeed, the new Act allows LECs to file a statement of the terms and conditions of interconnection they offer,[218] much like we currently do now when we file tariffs. In California, we have sought both approval of a tariff which covers the whole set of common elements to choose from for CMRS interconnection, and permission to individually negotiate other elements. The CPUC has not yet ruled on our tariff but has supported this approach,[219] and we intend to continue to make filings in support of this approach where appropriate. Nevada Bell has approved tariffs for its interconnection arrangements.

218 Section 252(f)(1).
219 D.94-04-085, at 11-12.